

The issues are: (1) whether appellant established that she had a period of disability between August 1, 2004 and September 23, 2008 causally related to her March 12, 2001 employment-related injury; and (2) whether the Office properly denied appellant's request for reconsideration without a further merit review.

FACTUAL HISTORY

On March 28, 2001 appellant, then a 43-year-old registered nurse, filed a traumatic injury claim alleging that she injured her neck and lumbosacral area on March 12, 2001 while lifting a patient. She stopped work on March 12, 2001 and returned to work on March 19, 2001.

In a March 12, 2001 work restriction form, Dr. Nestor Gonzalez, Board-certified in family medicine, noted treating appellant from March 12 to 18, 2001. He advised that she could return to work on March 19, 2001. Dr. Gonzalez diagnosed lumbar and cervical myositis.

A March 20, 2001 authorization for treatment form from Dr. Angel Green, a Board-certified internist, noted that appellant had a past history of old traumatic injury. Dr. Green diagnosed cervical myositis and lumbar sprain. He also noted that appellant's condition was caused by her employment. Dr. Green further noted that appellant was totally disabled on March 20 and 21, 2001. In a duty status report of the same date, he reiterated his diagnosis of cervical myositis and lumbar strain. Dr. Green also advised that appellant could not resume working. In subsequent duty status reports dated March 28 and April 17, 2001, he noted that appellant injured herself while lifting a patient on March 12, 2001. Dr. Green diagnosed cervical myositis and lumbosacral sprain. He also advised that appellant could work with restrictions. In a May 21, 2001 duty status report, Dr. Green reiterated his diagnosis and advised that appellant could return to work full time without restrictions.

On April 30, 2008 appellant filed a claim for disability compensation beginning August 1, 2004.¹

In a July 28, 2008 decision, the Office accepted appellant's claim for lumbar back sprain, but did not accept cervical myositis as this was a type of pain, which was not a compensable condition under the Federal Employees' Compensation Act. Also on that date, the Office advised appellant of the factual and medical evidence necessary to establish her disability claim and allowed her 30 days to submit such evidence.

On August 28, 2009 appellant submitted a statement noting that she was submitting records from her chiropractor to support her claim. She accordingly submitted treatment notes from Dr. Eric Feiter, a chiropractor, dated between November 9, 2006 and April 13, 2007 that noted her complaint of neck and back pain associated with fibromyalgia. On November 11, 2006 Dr. Feiter noted reviewing x-rays of appellant's cervical, thoracic and lumbar spine. He did not diagnose a spinal subluxation in this or other treatment notes. Appellant also submitted another copy of Dr. Green's March 20, 2001 report.

In a September 26, 2008 decision, the Office denied appellant's claim for compensation between August 1, 2004 and September 23, 2008 finding that the evidence of record failed to support disability during the claimed period.

On October 8, 2008 appellant requested reconsideration.

¹ The Board notes that appellant stopped working in August 2004 and retired on disability for personal, nonwork-related medical conditions on March 25, 2005.

In an October 22, 2008 decision, the Office denied appellant's reconsideration request without a merit review finding that she did not submit any new evidence or raise any legal questions not previously considered.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Act² has the burden of establishing the essential elements of her claim, including that any specific condition or disability for which she claims wage-loss compensation is causally related to the employment injury.³

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁴ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁵ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁷

² 5 U.S.C. §§ 8101-8193.

³ *Tammy Medley*, 55 ECAB 182 (2003).

⁴ *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

⁵ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); see *Huie Lee Goal*, 1 ECAB 180, 182 (1948).

⁶ *G.T.*, *supra* note 5; *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁷ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar back sprain in the performance of duty. Appellant claims that this injury caused her disability for employment between August 1, 2004 and September 23, 2008. However, this contention is not supported by the medical evidence of record.

The only medical evidence that appellant submitted after she claimed disability compensation was Dr. Green's March 20, 2001 report which was previously of record. This report predates the period of claimed compensation that began on August 1, 2004. As noted, for each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Appellant has not presented any medical evidence specifically addressing the claimed period of disability which explains why such disability was caused by the March 12, 2001 work injury.

Appellant also submitted several treatment notes from Dr. Feiter dated between November 9, 2006 and April 13, 2007 noting her complaint of neck and back pain. Dr. Feiter noted reviewing x-rays but he did not diagnose a spinal subluxation based on his review of x-rays. The Board notes that a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.⁸ As Dr. Feiter did not diagnose a spinal subluxation based on x-ray, he is not a "physician" under the Act and his reports are of no probative value.⁹

For these reasons, the medical evidence of record does not establish that appellant was disabled for employment beginning August 1, 2004 as a result of her March 12, 2001 work injury.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ Section 10.608(b) of Office regulations provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

⁸ See 5 U.S.C. § 8101(2) (the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist); *Mary A. Ceglia*, 55 ECAB 626 (July 22, 2004).

⁹ See *A.O.*, 60 ECAB ____ (Docket No. 08-580, issued January 28, 2009).

¹⁰ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

¹¹ 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration consists of an appeal request form with a checkmark next to "reconsideration." She did not explain any reasons why she thought the Office's decision was incorrect. Appellant does not satisfy any of the three criteria required to reopen a case for merit review. Her request does not attempt to show that the Office erroneously applied the law because she did not identify a point of law that was erroneously applied or interpreted. Appellant's request form also did not advance any new relevant legal arguments not previously considered by the Office. In addition, she did not submit any new medical evidence addressing whether her claimed period of disability was due to her March 12, 2001 work injury. This is important because the underlying issue is medical in nature; whether appellant has submitted sufficient medical evidence establishing that her claimed disability beginning August 1, 2004 was due to her work injury. As a result, no relevant and pertinent new evidence supports appellant's request for reconsideration.

Consequently, the Office properly denied appellant's request for reconsideration without a further merit review.

On appeal, appellant asserts that her claim for compensation should be accepted as her cervical and back condition has worsened making her unable to obtain gainful employment. She also asserts that, due to her condition, she needs medical equipment consisting of a shower chair and lumbar support. As noted above, the Board found that the medical evidence of record was insufficient to establish disability during the claimed period. The Board further found that appellant did not meet any of the three criteria necessary to warrant reopening her case.

CONCLUSION

The Board finds that appellant did not establish that she had a period of disability between August 1, 2004 and September 23, 2008 causally related to her March 12, 2001 employment-related injury. This Board also finds that the Office properly denied appellant's request for reconsideration without a further merit review.¹²

¹² The Board notes that appellant submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated October 22 and September 26, 2008 are affirmed.

Issued: October 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board